Supreme Court, U.S.
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MAY 16 1989
JOSEPH F. SPANIOL, JR.
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No. 88-1862

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JACK E. FLEMING,

Petitioner

vs.

HONORABLE SHERMAN G. FINESILVER
HONORABLE MONOROE G. McKAY
HONORABLE JAMES K. LOGAN

Respondents

PETITION FOR A WRIT OF MANDAMUS,
or WRIT OF PROHIBITION, or BOTH,
PURSUANT TO U. S. SUPREME COURT RULE 27.

Submitted by:

Jack E. Fleming
3624 Citadel Drive North,
Suite 250
Colo. Spgs., Colo. 80909
(719) 598-5286

Petitioner is Pro Se.

50pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Honorable Sherman G. Finesilver can legally enjoin Petitioner from proceeding as a proponent of any claim at any time within the U. S. District Court without the representation of an attorney licensed to practice in the State of Colorado and admitted to practice in the District Court.

2. Whether the Honorable Sherman G. Finesilver can ever legally order the dismissal of any suit to which the Petitioner is a plaintiff in the U. S. District Court if he does not employ an attorney to represent him.

3. Whether the Honorable Sherman G. Finesilver can legally order the Clerk of the U. S. District Court for the District of Colorado to not accept any new pleadings initiating a civil action by the Petitioner unless he is represented by an attorney licensed to practice in the State of

Colorado and also by the U. S. District Court.

4. Whether the Honorable Sherman G. Finesilver and the Plaintiffs in Civil Action No. 88-F-1590 violated and/or deprived the Petitioner of his federal constitutional right of access to the courts when the Plaintiffs filed their complaint and motion for injunctive relief and when the court entered its order and judgment in the favor of the Plaintiffs in the subject civil action on January 6, 1989.

5. Whether the Honorable Sherman G. Finesilver can legally dismiss the Petitioner's counterclaim filed pursuant to Title 42 USC sec. 1983 and 1985 based on injunctive relief that is a direct violation and/or deprivation of the Petitioner's federal constitutional rights as noted in the third paragraph on page seven (7) of the Court's order. (See Appendix A)

6. Whether the Petitioner's filing of six (6) lawsuits pursuant to Title 42 USC sec.

1983 within the U. S. District Court for the District of Colorado within a period of almost three (3) years constitutes a severe abuse of the judicial process by the Petitioner so that an injunction must be entered to preclude the Petitioner from prosecuting, pro se, any of his claims currently pending within the federal court system and also preclude the Petitioner from filing any new lawsuits, pro se, within the U. S. District Court for the District of Colorado.

7. Whether the Petitioner, who has been a citizen of the United States of America all of his life, is actually covered by the U. S. Constitution and all of its amendments so that he may enjoy all of the rights, liberties and priviledges so granted by the Constitution to include but not limited to due process of law, equal protection under the law, and access to the courts in his daily personal, business and religious life and also to include whenever

he is a pro se litigant in any of the courts, both state and federal, located within the United States of America and its territories.

8. Whether the Honorable Monroe G. McKay and Honorable James K. Logan erred when they refused to grant Petitioner's petition for a writ of mandamus and/or prohibition to nullify the subject order and judgment of the Honorable Sherman G. Finesilver as being unconstitutional.

9. Whether the U. S. Court of Appeals for the 10th Circuit denied the Petitioner procedural due process regarding his petition for mandamus and/or prohibition and petition for rehearing when both petitions were only considered and ruled on by two (2) judges instead of three (3) as required by law when the petitions were submitted for the consideration of the Court.

OTHER PARTIES TO PROCEEDING

Neil Tillquist, Esquire

Gary R. Cowan, Esquire

Kim B. Childs, Esquire

John M. Law, Esquire

Stanley C. Kent, Esquire

Robert R. Montgomery, Esquire

William A. Huston, Esquire

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CITATION OF OPINIONS OF COURTS BELOW

Opinions of lower courts cited below:

State of Colorado ex rel, et. al. v. Jack E. Fleming, Case No. 88-F-1590. (Appendix A and Appendix B)

Jack E. Fleming v. Honorable Sherman G. Finesilver, Case No. 89-1020 (Appendix C)

Jack E. Fleming v. Honorable Sherman G. Finesilver, Case No. 89-1020 (Appendix D)

JURISDICTION

1. The Petitioner believes that both the District Court and the Plaintiffs did not have the proper jurisdiction to do what they did in 88-F-1590. The Plaintiffs in the case cited a case known as the People of the State of Colorado v. Carter, 678 F. Supp. 1484, 1486 (D. Colo. 1986) as the proper jurisdiction for the court in their complaint filed in October, 1988.

2. The Honorable Sherman G. Finesilver stated in his court order of January 18, 1989 (Appendix A) that he had jurisdiction in 88-F-1590 pursuant to the court's authority to control abusive litigation before it. Judge Finesilver did not cite in his

order any court rule, U. S. Supreme Court decision or any federal statute that gave him the jurisdiction he claimed he had. The Petitioner believes that no court rule or federal statute exists that allows the District Court to violate and/or deprive one of his federal constitutional rights. It is the Petitioner's belief that this Court to date has not ruled on this issue.

3. The date of opinion and order of the U. S. District Court which enjoined the Petitioner from going to court, pro se, was January 18, 1989. The amended judgment was dated January 23, 1989. The order denying the Petitioner's petition for a writ of mandamus and/or prohibition with the U. S. Court of Appeals. 10th Circuit is dated February 9, 1989. The order denying the Petitioner's petition for rehearing, en banc, within the U. S. Court of Appeals, 10th Circuit is dated April 3, 1989.

4. The jurisdiction of this Court is invoked pursuant to 28 USC 1651(a).

TABLE OF AUTHORITIES

CASES

Allied Chemical Corp. v. Daiflon Inc.
449 US 33, 66 L Ed 2d 193. 101 S. Ct. 188 (1980)

Bounds v. Smith
430 US 817, 828, 52 L Ed 2d 72, 97 S. Ct. 1491, 1498 (1977)

California Motor Transport Co. v. Trucking Unlimited.
404 US 508,513, 30 L Ed 2d 642, 92 S. Ct. 609, 613 (1972)

Carter v. United States
733 F2d 735, 737 (10th Cir. 1984)

Chambers v. Baltimore & Ohio Railroad
207 US 142, 148, 52 L Ed 143, 28 S. Ct. 34, 35 (1907)

Green v. Warden
699 F2d 364 (7th Cir. 1983), cert. denied 103 S. Ct. 2436 (1983).

McKay v. Hammock
730 F2d 1367, 1375 (10th Cir. 1984)

Shaw v. Neece
727 F2d 947 (10th Cir. 1984)

Silver v. Cormier
529 F2d 161, 163 (10th Cir. 1976)

Wolff v. McDonnell
418 US 539, 579, 41 L Ed 2d 935, 94 S. Ct. 2963, 2986 (1974).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. Constitution

First Amendment

Fifth Amendment

Fourteenth Amendment

STATEMENT OF THE CASE

In October, 1988, the Plaintiffs in the case known as 88-F-1590, filed their complaint and motion for injunctive relief in the U. S. District Court for the District of Colorado. On January 6, 1989, there was a trial held in Judge Finesilver's court regarding the Plaintiff's request for injunctive relief. The Petitioner, as the Defendant in this case, stated under oath at the trial that he felt that the court had exceeded its jurisdcition because it could not deny him access to the courts as requested by the Plaintiffs. The Defendant also stated that he felt that the court did not have the power or authority to deprive one of his federal constitutional rights. At the end of the trial, the Court did grant the injunctive requested by the Plaintiffs. On January

18, 1989, the Court did issue its written opinion and order in this matter which is known as Appendix A. On January 23, 1989, the Court did issue its judgment in the matter which is known as Appendix B. On January 25, 1989, the Petitioner filed in the U. S. Court of Appeals, 10th Circuit his petition for a writ of mandamus and/or prohibition seeking to have the District Court's order nullified as being unconstitutional. On February 9, 1989, the U. S. Court of Appeals, in an opinion by Judges McKay and Logan, refused to grant the petition in its ruling known as Appendix C. The Petitioner also feels that he was denied procedural due process here with this opinion because it was given by only two (2) judges instead of the required three (3) judges. On February 20, 1989, the Petitioner filed with the U. S. Court of Appeals his petition for rehearing en banc. The Court refused to grant the petition and affirmed the opinion and order of Judges McKay and Logan. That opinion and order

is known as Appendix D.

In the complaint filed by the Plaintiffs, they stated that the jurisdiction for this matter was established in a case known as State of Colorado v. Carter, 678 F. Supp. 1484, 1486 (D. Colo. 1986). This was an opinion and order issued by Judge Finesilver in that case. The Opinion issued by Judge Finesilver was never appealed by Mr. Carter or anyone else to a higher federal court. Whether the actions of Judge Finesilver in this case were constitutional has never been ruled upon or never will be ruled upon by a higher federal court. Therefore, the issue in this petition should be considered by this Court as a matter of first impression. Whether a U. S. District Court can legally enjoin a pro se litigant from any and all further proceedings in the federal court without a licensed attorney must be ruled on by this Court. A matter of this type falls into the category of severe abuses of discretion by the District Court and the U. S. Court of Appeals. Severe abuses

of discretion that involve constitutional implications are issues that can be and should be addressed and corrected by a petition for a writ of mandamus and/or prohibition. The Petitioner's right of access to the courts has already been established in numerous rulings by this Court. The U. S. Court of Appeals, 10th Circuit has already ruled on the issue of access to the courts in Silver v. Cormier 529 F2d 161, 163 (1976), Shaw v. Neece 727 F2d 947 (1984), and McKay v. Hammock 730 F2d 1367, 1375 (1984). In those cases, the U. S. Court of Appeals stated that the right of access to the courts was protected by the U. S. Constitution. In Carter v. United States 733 F2d 735, 737 (1984), the U. S. Court of Appeals, 10th Cir. stated that the District Court may impose conditions upon a litigant, even onerous conditions, so long as they are not burdensome as to deny the litigant meaningful access to the courts. Having already ruled on this issue in these cases, it does not make it easy

to understand why Judges McKay and Logan ruled the way they did in their opinion and order known as Appendix C. In Green v. Warden 699 F2d 364 (7th Cir. 1983), cert. denied 103 S. Ct. 2436 (1983), that Court ruled that the right to seek redress of one's grievances has been described as "the foundation of orderly government". They quote as their source for that statement this Court's decision in Chambers v. Baltimore & Ohio Railroad 207 US 142, 148, 28 S. Ct. 34, 35, 52 L Ed 143 (1907). They go onto to say "the right remains one which we must zealously and solictously safeguard". This Court has established in its opinions in Wolff v. McDonnell 418 US 539, 579, 41 L Ed 2d 935, 94 S. Ct. 2963, 2986 (1974) that the constitutional right of access to the courts springs from the due process clause. It also comes from the priviledges and immunities clause as so stated in Chambers v. Baltimore & Ohio Railroad, supra. This Court stated in California Motor Transport Co. v. Trucking Unlimited 404 US 508,

513, 30 L Ed 2d 642, 92 S. Ct. 609, 613 (1972) that it also comes from the First Amendment to the U. S. Constitution. And in Bounds v. Smith 430 US 817, 828, 52 L Ed 2d 72, 97 S. Ct. 1491, 1498 (1977), this Court simply stated that the right of access to the courts is fundemental. In Allied Chemical Corp. v. Daiflon Inc. 449 US 33, 66 L Ed 2d 193, 101 S. Ct. 188 (1980), this Court stated that a writ of mandamus is used in the federal courts to confine an inferior court to a lawful exercise of its jurisdiction. That is exactly what the Petitioner is asking for in this petition. In that same case, this Court also ruled that only exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of the extraordinary remedy of a court's issuing a writ of mandamus. The Petitioner is alleging that the District Court order (Appendix A) was definitely an usurpation of power on the part of Judge Finesilver, and that action warrants the issuance of the requested writ

as a lawful remedy in this case. The Petitioner is entitled to speedy relief from Judge Finesilver's unconstitutional order pursuant to 28 USC 1651(a) and the U. S. Constitution.

CONCLUSION

A litigant has access to the courts of the United States or he does not. Whether the litigant hires an attorney to represent him is a matter of choice. Most people that go to court pro se probably do so because they cannot afford the services of an attorney. They may also dislike and/or distrust all attorneys which is also a matter of choice. Nowhere in the U. S. Constitution does it state that a man can be forced by a court to use the services of an attorney regardless if he can afford one or if he dislikes or distrusts them. Forcing one to act against his will in matters of choice while he is in the courts is nothing less than judicial discrimination. If this opinion and order of Judge Finesilver

would be allowed to stand, then the courts later on could be telling us where we could live, what kind of cars we could own and drive, and where we must send our kids to be educated.

This Court has the inherent power pursuant to Article 3 of the U. S. Constitution to do what is necessary to preserve the status quo within the judicial system. If pro se litigants are generally abusive and file vexatious and malicious lawsuits, then this Court needs to establish a policy and/or procedure to be used by all courts within the United States on how to handle them while within the judicial system. Pro se litigants cannot be completely enjoined from access to the courts just because they filed some lawsuits, that in the opinion of the presiding judge, were abusive, vexatious or malicious. The presiding judge cannot alone make a judgment that a pro se litigant's pleadings are not in keeping with high judicial standards. There must

be a procedure established for pro se litigants to follow when preparing, filing and prosecuting his lawsuits.

Access to the courts is probably the most important constitutional right we have when we look at our judicial system as being the "foundation of orderly government". If our judiciary fails, that will be when our democracy begins to fail.

If this Court does reject this petition, then it will be setting precedent that "one cannot go to and be heard in court without an attorney". That will become the law of the land.

This Court must grant this petition and allow argument from both sides to be presented so that it can rule on an issue that is of great importance to many many citizens of the United States of America.

REASONS FOR GRANTING THE PETITION

1. The Petitioner at this time has no other adequate means to attain speedy relief from subject court order. The Petitioner has sought relief from the U. S. Court of Appeals, 10th Circuit, and the same was denied. This Court is the only Court left to consider at this time whether Judge Finesilver's court order and judgment are constitutional. The Petitioner has a perfect and speedy right to be relieved from a court order that is unconstitutional.

2. The order and judgment of Judge Finesilver, if allowed to stand at this time, will impose tremendous hardship and expense upon the Petitioner because he will have to try and hire a licensed attorney before he can proceed any further with any pending or future actions in the U. S. District Court for the District of Colorado. At present, the financial condition of the Petitioner would absolutely preclude him from hiring any attorney to represent him

in his federal actions. If the Petitioner cannot find an attorney he can afford and/or one that agrees with his views in his actions, he will really be deprived of access to the courts as provided for by the U. S. Constitution and its respective amendments (1, 5 & 14) because of the subject order and judgment. Also, the Petitioner cannot recover the legal expenses generated while he was enjoined from the use of the court as a pro se litigant. Also, the Petitioner will be prejudiced in a way not correctable on appeal because the Petitioner cannot go to court at all because of a lack of financial means. Also, it is possible that of the new actions the Petitioner has now, the statute of limitations on these potential actions could expire before this matter would be resolved on a direct appeal.

3. There is no doubt that the District Court's order and judgment are clearly in error as a matter of law and in direct contrast with the U. S. Constitution. The

District Court does not have the jurisdiction pursuant to any federal statute to enjoin a pro se litigant from filing new and/or maintaining old actions in the court. A court may not render a judgment which transcends the limits of its authority, and a judgment is void if it is beyond the powers granted to the court by the law of its organization even where the court had jurisdiction over the parties and the subject matter.

4. The order and judgment of the Honorable Sherman G. Finesilver violates and/or deprives the Petitioner of his federal constitutional right of access to the courts as so protected by the U. S. Constitution and its amendments, namely, amends 1, 5, 14.

5. Judge Finesilver's order raises the question, and that being, one of first impression. Can the Court really enjoin a pro se litigant from the use of the courts just because he filed six (6) Title 42 USC

sec. 1983 actions over a period of three (3) years against several state court judges and other prominent judicial people? This issue must be addressed by this Court because it is the only Court left in the United States to address this issue.

RELIEF SOUGHT FROM THIS COURT

1. That an order be issued directed to the said Honorable Sherman G. Finesilver, Chief Judge of the United States District Court for the District of Colorado, requiring him to show cause in this Court, at a time designated, why he should not vacate and set aside his order issued on January 18, 1989 granting Plaintiffs' motion for injunctive relief in 88-F-1590.

2. That an order be issued directed to the said Honorable Sjerman G. Finesilver requiring him to show cause in this Court, at a time designated, why he should not reinstate the Petitioner's counterclaim pursuant to Title 42 USC sec. 1983 and 1985 as so noted in the third paragraph

on page seven (7) of the court's order dated January 18, 1989.

3. That an order be issued directed to the Honorable Monroe G. McKay and the Honorable James K. Logan requiring them to show cause in this Court, at a time designated, why they should not vacate and set aside their order issued on February 9, 1989 denying Petitioner's petition for a writ of mandamus and/or prohibition.

4. That a writ of mandamus, or prohibition, or both, issue directing the Honorable Sherman G. Finesilver to vacate and set aside his order dated January 18, 1989 granting the said motion for injunctive relief and dismissal of the Petitioner's counterclaim as described herein.

5. That a writ of mandamus, or a writ of prohibition, or both, issue directing the Honorable Monroe G. McKay and the Honorable James K. Logan to vacate and set aside their order of February 9, 1989 denying the Petitioner's petition for a writ of

mandamus.

6. That pending argument upon this petition and disposition thereof by this Court, the Honorable Judges Finesilver, McKay and Logan be ordered to "stay" their orders as described herein.

7. That Petitioner have such additional relief and process as may be appropriate in the premises.

Respectfully submitted,

Jack E. Fleming, Petitioner
3624 Citadel Dr. No. #250
Colo. Spgs., Colo. 80909
(719) 598-5286

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the Petitioner's petition for a writ, postage pre-paid, this 9th of May, 1989 to:

Honorable Sherman G. Finesilver
c/o United States District Court
1929 Stout Street
Denver, Colorado 80294

Honorable Monroe G. McKay
c/o U. S. Court of Appeals, 10th Cir.
1929 Stout Street
Denver, Colorado 80294

Honorable James K. Logan
c/o U. S. Court of Appeals, 10th Cir.
1929 Stout Street
Denver, Colorado 80294

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660 Southpointe Court, Suite 210
Colorado Springs, Colorado 80906

Robert R. Montgomery, Esquire
5445 DTC Parkway, Suite 800
Englewood, Colorado 80111

William A. Huston, Esquire
1658 Cole Blvd., Suite 275
Golden, Colorado 80401

APPENDIX

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 88-F-1590

STATE OF COLORADO ex rel. Colorado Judicial Department; HALL AND EVANS; COOPER AND KELLEY, P.C.; LAW, KNOUS AND KEITHLEY; SUSEMIHL, LOHMAN, KENT, CARLSON, AND McDERMOTT, P.C.; MONTGOMERY, LITTLE, YOUNG, CAMPBELL AND McGREW; and HUSTON and WOODHOUSE, P.C.,

Plaintiffs,

vs.

JACK E. FLEMING,

Defendant.

ORDER

Sherman G. Finesilver, Chief Judge

This matter comes before the court on trial to the court of plaintiff's claims, and plaintiffs' motion to dismiss defendant's counterclaims. Plaintiffs seek an injunction against defendant's filing of pro se lawsuits, and defendant has filed a counterclaim alleging civil rights violations. Jurisdiction is based

on this court's authority to control abusive litigation before it. In re Martin-Trigona, 737 F.2d 1254 (2d Cir. 1984); People of the State of Colorado v. Carter, 678 F.Supp. 1484, 1486 (D. Colo. 1986); Turner v. American Bar Association, 407 F.Supp. 451 (N.D. Tex. 1975). The court has carefully considered all of the evidence presented, the testimony of the witnesses, and the applicable law. The following constitutes the court's findings of fact and conclusions of law, as supplemented by the findings stated from the bench at the close of the evidence at the trial on January 6, 1989. For the reasons stated below, judgment is entered in favor of plaintiffs and against defendant on their claims, and defendant's counterclaims are dismissed.

Although there is a constitutional right to access to the courts, there is "no constitutional right of access to the courts to

prosecute an action that is frivolous or malicious." Phillips v. Carey, 638 F.2d 207, 208 (10th Cir. 1981). In order to protect the rights of other litigants to access to the courts, and to protect defendants from harassing, abusive, and meritless litigation, courts have authority to place reasonable restrictions on litigants who abuse the judicial process. Phillips v. Carey, 638 F.2d 207, 209 (10th Cir. 1981); Theriault v. Silber, 574 F.2d 197 (5th Cir. 1978); People of the State of Colorado v. Carter, 678 F.Supp. 1484, 1486 (D. Colo. 1986).

The court finds that enjoining Mr. Fleming from proceeding as a pro se plaintiff in this district is a reasonable restriction, warranted by his abuse of the legal process. Mr. Fleming filed six cases in Federal court in this district in two years. Those cases are

summarized in Appendix A to this order. Appendix A also lists Colorado state court actions filed by Mr. Fleming.

Mr. Fleming has filed duplicative causes of action which are frivolous, vexatious, and without legal merit. For example, after Mr. Fleming did not prevail in an action stemming from the dissolution of a partnership agreement, he filed a second cause of action arising out of the same partnership agreement. Fleming v. Seeger, 85CV1884 (El Paso District Court). After summary judgment was entered against him in that action, he filed a third action against his opponent's attorneys. Fleming v. Kent, 85CV4299-9 (El Paso District Court). He also filed a grievance against his opponent's attorney with the Colorado Supreme Court. When that grievance was dismissed, he filed an action in federal court to review the decision of the

Colorado Supreme Court. Fleming v. Quinn, 86-F-1923. His action was dismissed, and the dismissal was affirmed on appeal. Fleming v. Quinn, 87-1559 (10th Cir. slip op., November 2, 1987). Meanwhile, after Mr. Fleming's third state court action was dismissed, he filed another action, this time in federal court, against his former opponent, the presiding judge, his opponents' attorneys, and his opponent's insurer. Fleming v. Cannon, 87-M-2011. The case was dismissed. Another federal action was filed against a state judge who refused to grant Mr. Fleming's motion for relief from judgment in the third state court action. Fleming v. Anderson, 88-C-488. That case was dismissed, and fees were assessed against Mr. Fleming.

Similarly, after Mr. Fleming had summary judgment entered against him in a legal

malpractice action, Fleming v. Kofoed, 85CV10062-1 (Denver District Court), and fees were assessed against him, Mr. Fleming brought suit against the presiding judge, his former opponents and his opponent's insurer, in federal court. Fleming v. Rothenburg, 88-F-490. That action was dismissed. Mr. Fleming brought the same malpractice claims again in state court. Fleming v. Visciano, 86CV4339-9. Summary judgment was granted against Mr. Fleming, and fees were assessed against him. Again, Mr. Fleming sought review of that decision in federal court by suing the presiding judges, his opponents, his opponents' attorneys, and his opponents' insurer. Fleming v. Martin, 88-F-489. This case was dismissed.

Finally, Mr. Fleming has summary judgment entered against him in an action on a promissory note. Mr. Fleming sought review of that

decision in federal court by bringing suit against the presiding judges, his opponents, and his opponent's attorneys. 88-C-487. That case was dismissed, and fees were assessed against Mr. Fleming.

Mr. Fleming has refused to follow standard methods of appeal. After the earliest of Mr. Fleming's losses in state court, he correctly sought review in the Colorado Court of Appeals, and the Colorado Supreme Court. Mr. Fleming has testified before this court, however, that he now does not believe that the Colorado Court of Appeals is interested in his problems, and that he believes that the state courts are not obligated to protect his rights under the Federal Constitution. Hence, he decided that he would no longer appeal adverse rulings to the Colorado Court of Appeals, but rather would bring suit against the state judges and his opponents' attorneys in federal court.

Mr. Fleming has been informed repeatedly, both by the United States District Court, and the Tenth Circuit Court of Appeals, that federal courts have no jurisdiction to review the decisions of state judicial officers. The Tenth Circuit Court of Appeals' decision on the first of Mr. Fleming's cases is attached to this order as Appendix B. Clearly, Mr. Fleming has not responded to the court's orders, since all of his federal cases are attempts to review the judgments of state courts.

Mr. Fleming has shown a lack of regard for court procedures and rules. As stated above, Mr. Fleming has been repeatedly assessed attorney's fees in this pro se actions. In his second state court action arising out of his claims of legal malpractice, Mr. Fleming was jailed for three days for contempt of court for refusal to co-operate in the court's order of

Rule 69 examinations. Mr. Fleming's multiple filings also show a lack of regard for the court's resources and the rights of other litigants to access to the court.

Although Mr. Fleming's initial state court lawsuits may have been based on his good faith belief of legal right to recovery, his later litigation evinces his willingness to file actions for vexatious and harassing purposes, with total disregard for the legal merits of the action. Mr. Fleming has been informed by court after court that he cannot bring suits against attorneys or judges to review decisions adverse to him, but he has continued to do so. His correspondence with his opponents reveals that he brings his lawsuits because he believes that fear of pending litigation will give him leverage in his disputes. For example, one

letter to attorney Frank Visciano dated February 11, 1986 demanded a settlement of pending lawsuits, and speculated that if a claim were filed against him, Mr. Visciano's professional liability insurance rates would skyrocket. The letter also pointed out that defending the suit would be expensive and time consuming. Finally, the letter reminded Mr. Visciano that Mr. Fleming did not have to operate under the Code of Professional Responsibility. Plaintiffs' Exhibit 9. A letter to attorney Kim Childs dated April 27, 1988 threatened to file an additional suit against Mr. Childs, the suits against judges which would duplicate previous suits. The letter pointed out that Mr. Childs would be the only attorney in the country with three civil rights suits pending against him, and that two civil rights suits would be pending against his clients. Plaintiffs' exhibit 13.

In a letter to attorney William Huston dated June 29, 1988, Mr. Fleming demanded that a judgment against him be voided and money returned, and threatened that future lawsuits would be filed against Mr. Huston, his clients, and the judges if Mr.Fleming's demands were not met. Plaintiffs' Exhibit 17. Mr. Fleming testified before this court that he does not retain attorneys to represent him in his lawsuits because he finds the prohibitive cost of attorneys inhibits his access to the courts. Mr. Fleming does not seem to be concerned with the fact those he brings suits against are thereby forced to incur legal fees.

Finally, Mr. Fleming has misled the courts before which he has appeared. In his legal malpractice case, Mr. Fleming retained an expert to render an opinion as to the performance of Mr. Fleming's former attorneys. In his

deposition, however, Mr. Fleming's expert stated that his opinions were based on inaccurate information given to him by Mr. Fleming. In another case, Fleming v. Seeger, 86CV2237-3 (El Paso District Court), Mr. Fleming attempted to collect on a note from his former partner, despite the fact that the note had already been paid by the former partner in previous litigation. Bank of the Rockies v. Fleming, 88CV1985-6 (El Paso District Court).

The court finds that remedies at law have proven ineffective in preventing Mr. Fleming's abuse of the legal process. Rule 11 of the Federal Rules of Civil Procedure, and 28 U.S.C. Section 1927 both provide courts with power to sanction abusive pro se litigants. However, repeated sanctions against Mr. Fleming, and even incarceration for civil contempt, have proven ineffective in deterring Mr. Fleming's pattern

of litigation. Mr. Fleming's financial situation prevents monetary sanctions from being effective. Indeed, in responding to a motion for sanctions in this case, Mr. Fleming argued, through his attorney, that sanctions should not be imposed against him because he is unemployed.

Plaintiffs move to dismiss defendant's counterclaim. This court has found that an injunction against defendant's filing of pro se litigation is appropriate, and does not violate defendant's constitutional rights. The counterclaim should therefore be dismissed.

ACCORDINGLY, it is hereby ORDERED that Mr. Jack E. Fleming is ENJOINED from proceeding as a proponent of any claim in the United States District Court for the District of Colorado without the representative of an attorney licensed to practice in the State of Colorado and admitted to practice in this court.

IT IS FURTHER ORDERED that all cases pending in the United States District Court for the District of Colorado in which Mr. Fleming is a plaintiff, and in which he does not employ counsel to represent him within thirty days, shall be subject to dismissal.

IT IS FURTHER ORDERED that the Clerk of the Court is directed not to accept any new pleadings initiating a civil action by Mr. Jack E. Fleming unless he is represented by an attorney licensed to practice in the State of Colorado and by the United States District Court of Colorado.

IT IS FURTHER ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiffs and against defendant on plaintiff's claims. Each party to pay its own costs.

IT IS FURTHER ORDERED that defendant's counterclaims are dismissed.

Done this 18th day of January, 1989 at Denver, Colorado.

By the Court:

Sherman G. Finesilver, Chief Judge

United States District Court

APPENDIX A

SUMMARY OF FEDERAL DISTRICT COURT ACTION INITIATED IN THIS DISTRICT BY JACK E. FLEMING

A. Fleming v. Quinn, et al. (86-F-1923

An action commenced on March 30, 1986 by Fleming to challenge the Colorado Supreme Court's dismissal of a grievance filed by Fleming against an attorney. Fleming contended the dismissal of the grievance was a denial of his constitutional right to due process of law. Defendants were the Chief Justice of the Colorado Supreme Court, and the committee counsel and investigator for the Colorado attorney grievance committee.

1. Trial Court

Action dismissed on March 27, 1987. The court's order stated that Federal courts will not review judgments of state courts, and that state judicial officers have immunity from suits for damages.

2. Court of Appeals

Dismissal affirmed on November 2, 1987. The Tenth Circuit Court of appeals stated that plaintiff's challenge to an adverse decision by the Colorado Supreme and grievance committee did not fall within the subject matter jurisdiction of the federal courts.

B. Fleming v. Cannon, et al. (86-2011)

Suit by Fleming commenced on September 27, 1986, challenging the judgment of a state court against him in a legal malpractice action. Fleming claimed the judgment against him violated his constitutional rights. Defendants were the state court judge, an attorney and law firm which appeared against Fleming, and his opponent's insurer.

1. Trial Court

Complaint dismissed without prejudice on December 17, 1986. The court's opinion stated

that the Federal court would not review judgments of state courts pending on appeal within the state courts.

2. Court of Appeals

Appeal pending.

C. Fleming v. Rhodes, et al. (88-C-487).

Suite by Jack and Carolyn Fleming commenced on March 30, 1988 challenging the judgment of a state court against them in an action collecting on a promissory note. The Flemings claimed the judgment against them deprived him of his constitutional rights to freedom of speech and access to the courts. The complaint also alleged a conspiracy between the defendants to violate the Flemings' rights and gross negligence. Defendants were two state court judges, two attorneys and a law firm which appeared against the Flemings, and their opponent in the state court suit.

1. Trial Court

Complaint dismissed and sanctions imposed for filing of a frivolous complaint on May 10, 1988. The court's order stated that federal courts have no authority to review final judgments of state courts.

2. Court of Appeals

Appeal pending.

D. Fleming v. Anderson (88-C-488).

Suite commenced on March 30, 1988 by Fleming challenging the judgment of a state court against him in a legal malpractice lawsuit. Fleming contended the judgment violated his constitutional rights. Defendant was the state court judge.

1. Trial Court

Complaint dismissed and sanctions imposed for filing a frivolous complaint on May 10,

1988. The court's order stated that federal courts have no authority to review final judgments of state courts.

2. Court of Appeals

Appeal pending.

E. Fleming v. Martin, et al. (88-F-489).

An action commenced by Fleming on March 30, 1988 to challenge the validity a judgment against him in a state court legal malpractice action. Fleming contended the judgment violated his constitutional rights. Defendants were three state court judges, three attorneys and a law firm who represented Fleming's opponents, and his opponents' insurer.

1. Trial Court

Action dismissed on May 19, 1988. The court's order stated that federal courts have no jurisdiction to review state court rulings.

2. Court of Appeals

Appeal pending.

F. Fleming v. Rothenburg, et al. (88-F-490)

An action commenced by Fleming on March 30, 1988 to challenge a judgment against him in another state court legal malpractice action.

Again, defendants were the state court judge, three attorneys and a law firm who appeared against Fleming, and his opponent's insurer.

1. Trial Court

Action dismissed on May 19, 1988. The court's order stated that federal courts have no jurisdiction to review state court rulings.

2. Court of Appeals

Appeal pending.

APP 22

CASES INITIATED BY JACK E. FLEMING IN

COLORADO STATE COURT

Fleming v. Seeger, 84CV1614-5 (El Paso District Court)

Fleming v. Seeger, 85CV1884 (El Paso District Court)

Fleming v. Kent, 85CV4299-9, (El Paso District Court)

Fleming v. Kofoed, 85CV10062-1 (Denver District Court)

Fleming v. Seeger, 86CV2237-3 (El Paso District Court)

Fleming v. Visciano, 86CV4339-9 (Denver District Court)

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 88-F-1590

STATE OF COLORADO ex rel. Colorado Judicial Department; HALL AND EVANS; COOPER AND KELLEY, P.C.; LAW, KNOUS AND KEITHLEY; SUSEMIHL, LOHMAN, KENT, CARLSON, AND McDERMOTT, P.C.; MONTGOMERY, LITTLE, YOUNG, CAMPBELL AND McGREW; and HOUSTON WOODHOUSE, P.C.,

Plaintiffs,

vs.

JACK E. FLEMING,

Defendant.

AMENDED JUDGMENT

Pursuant to and in accordance with the Order of Permanent Injunction entered in this action on January 18, 1989 by the Honorable Sherman G. Finesilver, Chief Judge, it is hereby

ORDERED that Judgment is entered in favor of the Plaintiffs for permanent injunction as so

set forth in that Order and in accordance with Rule 65(d) of the Federal Rules of Civil Procedure. It is further

ORDERED that the counterclaims of the Defendant, Jack E. Fleming be and are hereby dismissed. It is further

ORDERED that each party shall bear its own costs. It is further

ORDERED that this Judgment supercedes the prior Judgment dated January 19, 1989.

DATED at Denver, Colorado, this 23rd day of January, 1989.

FOR THE COURT:

JAMES R. MANSPEAKER, CLERK

APPENDIX C

APP 25

FEBRUARY 1989

Before Honorable Monroe G. McKay and Honorable James K. Logan, Circuit Judges, United States Court of Appeals

JACK E. FLEMING	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 89-1020
	)	
SHERMAN G. FINESILVER, CHIEF JUDGE,	)	
	)	
Respondent.	)	

This is an original proceeding in the nature of mandamus and/or prohibition. Petitioner seeks an order of this court compelling the respondent court to vacate an order entered January 18, 1989, which, inter alia, enjoined petitioner from commencing further litigation or filing papers in the respondent court unless petitioner is represented by counsel.

It is well established that mandamus is a drastic remedy to be invoked only in

extraordinary situations. Further, the party seeking mandamus relief must establish: (1) that he has no other adequate means to obtain the relief he desire and (2) that his right to the issuance of the writ is clear and indisputable. Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33 (1980); Kerr v. United States Dist. Court, 426 U.S. 394 (1976). Further, the remedy of mandamus is not a substitute for proper appeal. Bankers Life & Casualty Co. v. Holland, 346 U.S. 379 (1953).

Upon the showing made by petitioner, we conclude that he is not entitled to the relief sought. According, the petition for writ of mandamus is denied.

ROBERT L. HOECKER, CLERK

By _____
Patrick Fisher
Chief Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JACK E. FLEMING	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 89-1020
	)	
SHERMAN G. FINESILVER, CHIEF JUDGE,	)	
	)	
Respondent.	)	

ORDER

Before HOLLOWAY, Chief Judge, MCKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges.

This matter is before the court on petitioner's petition for rehearing with suggestion for rehearing en banc.

The materials submitted by petitioner have been reviewed by the members of the hearing panel, who conclude that the original disposition was correct. Accordingly, the petition for rehearing is denied on the merits.

The petition having been denied on the merits by the panel to whom the case was submitted, the petition for rehearing with suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service in accordance with Rule 35(b) of the Federal Rules of Appellate Procedure. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk